

# IN FOCUS

## Welcome

Welcome to the summer edition of **In Focus**, our quarterly update keeping you informed of the latest developments in employment, pensions and incentives law.

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## The Equality Bill... what lies ahead?

Much of the detail of the Equality Bill (the Bill) has already been published in the national press as part of the Government's stated wish to encourage debate on forthcoming legislation in advance of the Queen's Speech in November. The Government has also released its response to the consultation on the Bill.

Proposals put forward in the Bill include the following:

- Public bodies having greater duties imposed on them to tackle discrimination and promote equality "through their purchasing function". This will impact on organisations that contract or deal with public bodies.
- A ban on secrecy clauses which prevent employees discussing their pay. This is a clause contained in some contracts of employment and the sanction for breaching that clause is often a disciplinary one. If this proposal is enacted, employers will have to review their contractual documents to remove such clauses and ensure line managers are aware of the changed position.
- The introduction of positive discrimination in recruitment and selection where there is an "under-representation of disadvantaged groups" (for example women and ethnic minorities) and the employer is selecting between two equally qualified candidates. Although it might be rare to be in that position employers may face an increasing number of challenges from unsuccessful prospective candidates. The focus would, therefore, be for employers to have proper recruitment procedures in place.
- The definition of indirect discrimination will be standardised for all strands of discrimination.



- The introduction of a "general occupational requirement" test across all strands of discrimination with the exception of disability. The CBI and employers have requested clear guidance on this so that there is a clear understanding of what is and is not permitted.
- Consideration is being given to extend protection from harassment rights to employees who are harassed by a customer or client (under any of the discrimination strands) and also to extend it beyond work to the provision of goods, facilities, services and public functions.

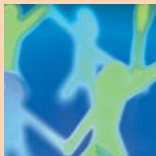
Following the recent ECJ case of *Coleman -v- Attridge Law & Law* (see below) regarding discrimination by association, the Government has said that it will look at the impact of that decision in discrimination legislation, so further changes may yet be introduced. Needless to say, it looks like 2009 may be yet another busy year for employers implementing the changes proposed under the Bill, although it is not yet clear when the Bill is expected to come into force.

## Disability discrimination by association

In *Coleman -v- Attridge Law & Law*, the European Court of Justice (ECJ) has held that the EC Equal Treatment Framework Directive is intended to cover "associative discrimination" in respect of direct discrimination and harassment. Associative discrimination is discrimination against a non-disabled person on the grounds of their association with another person who is disabled. The Disability Discrimination Act 1995 (DDA) implements the Framework Directive in respect of disability.

Mrs Coleman brought a claim for, amongst other things, direct disability discrimination and harassment. Mrs Coleman is not disabled but her son, for whom she has primary care responsibility, is. Mrs Coleman claimed that her employer treated her less favourably as a consequence – she alleged her employer called her "lazy" when she sought time off to care for her son and accused her of trying to manipulate her working conditions.

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## Employment news in brief

The Department for Business Enterprise & Regulatory Reform (BERR) has announced that the national minimum wage rates will rise with effect from 1 October 2008 as follows:

- the adult rate for workers aged 22 and over will rise from £5.52 to £5.73 per hour;
- the rate for workers aged 18 to 21 will rise from £4.60 to £4.70 per hour;
- the rate for workers aged 16 and 17 will rise from £3.40 to £3.53 per hour.

Employers are advised to review their rates of pay and ensure that they take into account the new higher rate from 1 October 2008.



The Employment Bill 2007-2008 should receive Royal Assent this year. Of interest to employers will be the repeal of the statutory dispute resolution procedures, extended periods of ACAS conciliation and a fast track for simple claims.



In May ACAS issued a new draft Code of Practice on discipline and grievance procedures. The draft Code of Practice was out for consultation until 25 July 2008. As currently drafted the Code of Practice is in much more general terms than the current Code. The Government's intention is that the new procedures will come into force in spring 2009 and it is ACAS's intention for the new Code of Practice to be issued on the same date. We will provide you with further details on these new procedures in the autumn In Focus publication.



The Government has announced plans that, with effect from 2009, it will ban the practice of employers using tips to count towards the national minimum wage. That means that employers will not be able to use the gratuities and service charges left by customers to 'top up' staff wages through the payroll. The Government has stated that it plans to make the practice of tipping fairer and more transparent. Consultation will begin with the hospitality industry in the autumn following which detailed guidance for employers and staff will be issued.

### Continued from page 1

Given the ECJ's ruling Mrs Coleman's case will now return to the tribunal for determination. The EAT has previously indicated that the DDA is capable of a purposive approach and so tribunals may already be able to consider claims for associative discrimination.

This decision means that employers should be

sensitive to employees who are the primary carers of disabled persons, particularly in relation to flexible working requests from such employees. Employers would now be advised to sit down with the employee to discuss their needs, many of which may be short term changes (see below), to work out a solution that works for both parties.

## Disability - the correct comparator...

The decision by the House of Lords in *London Borough of Lewisham -v- Malcolm* is likely to make it more difficult for employees to bring claims of disability-related discrimination. This case concerned a housing authority's decision to evict a schizophrenic tenant who had breached his tenancy agreement. Although not an employment case, it is likely to have an impact on discrimination legislation in the employment field.

The court held that:

- a person can only be liable for disability discrimination if he knows (or ought reasonably to have known) of an individual's disability;
- the words "a reason that relates to the person's disability" in section 3A of the DDA should be construed narrowly; and
- the correct comparator is a non-disabled person in the same circumstances as the disabled employee.

Previous case law had held that the appropriate comparator in "disability-related" discrimination cases would be someone to whom the reason for the claimant's treatment does not apply. For example, where a disabled employee is dismissed for absence

from work, the appropriate comparator would have been a non-disabled employee who had not been absent from work for the same period.

The House of Lords concluded that the correct comparator should be an individual who is in the same circumstances as the disabled individual, but who is not disabled. Following the example above, this would be an employee who had been absent from work, but for a reason that did not relate to a disability. If the comparator employee would have been dismissed as a result of his absence, then the disabled employee would not have been treated less favourably as a result of his disability and would be unable to bring a claim under the DDA.

The Government has not made reference to this case in the Equality Bill, unlike the Coleman case above. However, with the Government's drive on equality this may change. In the meantime, employers should be careful that they are not imputed with knowledge of a disability unwittingly, for example through information contained in medical notes or informal conversations between an employee and his line manager.

## Work life balance - how flexible can you be?

In May 2008, BERR (the Department of Business, Enterprise and Regulatory Reform) published Imelda Walsh's (J Sainsbury plc's HR Director) review of the right to request flexible working. The Government has accepted Imelda Walsh's key recommendations in full but a date has not yet been set for their introduction. In summary, those recommendations are:

- the right to request flexible working to be extended to those employees with parental responsibility for children up to the age of 16;
- the extension of the above right to be implemented in one go rather than a phased implementation;
- the 26 week qualifying period to remain.

The review found that 91% of flexible working requests (or a modified version of them) are agreed between the employer and employee and many

without invoking the statutory procedures. The report highlighted that many requests are to meet a short term need of the employee. This is not provided for under the current statutory regime and it is not known whether it will be provided for in the new regime.

Whilst an informal approach may have worked well in the past, the increase in the number of employees who can request flexible working in the future may see employers struggling to manage multiple applications, which they may not be able to accommodate, resulting in dissatisfied employees.

Therefore, employers may prefer to adopt a more formal approach to dealing with such requests and to provide training for line managers/supervisors to ensure that all requests are dealt with fairly and consistently, whilst at the same time complying with statute.

# Enhanced redundancy payments

The Employment Appeals Tribunal (EAT) has recently considered two cases of age discrimination in which employees have challenged enhanced redundancy payment schemes. The employer in each case had successfully defended the claims at tribunal, but the employees had then appealed to the EAT. The EAT upheld both appeals but on the grounds that the tribunal decisions did not explain their reasoning in sufficient detail and both cases were sent back to tribunal to be reconsidered.

However, the EAT gave some indications as to whether enhanced redundancy schemes could be justified. In the first case, the employee, who is in her 30s, complained that she had been treated less favourably than older employees with longer service than her, as the scheme provided for increased payments for older employees with more service.

In the second case, in which Burges Salmon acted for the employer, the claimant was aged over 60 and did not receive an enhanced redundancy payment as the scheme provided for payments to be tapered to zero between the ages of 57 and 60. In both cases, the issue was whether the different treatment, based on age, could be justified – i.e. whether the scheme was a proportionate means of achieving a legitimate aim of the employer, an employer's defence to a claim of direct discrimination.

In the first case, the EAT said that it may be possible to justify the scheme on the basis that it is reasonable to provide higher compensation to an employee with longer service in order to encourage loyalty, and to pay higher sums to older employees to encourage turnover and prevent blockage in the employment system.



In the second case, the EAT indicated that it may well be possible to justify the tapering of redundancy payments towards retirement in order to avoid a "windfall" for employees or where pension payments become available to employees. As stated above, both cases have been sent back to their respective tribunals to be reconsidered.

Point to note: in both cases the employer had the support of the majority of employees and/or the union not to change the schemes following the introduction of the Employment Equality (Age) Regulations 2006 (the "Regulations"). Therefore, employers who operate such schemes, and those schemes do not benefit from an exemption under the Regulations, may want to consider whether or not they can objectively justify the discriminatory impact of the scheme on its employees before it is challenged.



## Employment news in brief

Spring *In Focus* advised readers of the introduction of the new points based system for non-EEA nationals who wish to work in the UK. The new system is being phased in with the introduction of five new tiers. Tiers 1, 2 and 5 affect employers. Tier 1 (for highly skilled individuals) has now been fully implemented and tiers 2 and 5 (skilled workers, youth mobility and temporary workers) are due for implementation in November.

With effect from November employers must hold a sponsorship licence if they want to recruit foreign nationals under tiers 2 and 5. Applications must be made online to the Border and Immigration Authority (BIA). Given the small number of applications for licences currently being made by employers, the BIA anticipates a last minute applications rush. With the consequent backlog this will create, it will be important to get any applications that are necessary in now.

In the meantime the BIA has been busy spot checking employers to ensure they have the correct documents in place and are not employing illegal immigrants and some very significant fines against employers have been made.

This is an increasingly complicated area for employers and if you wish to speak to a member of the business immigration team, contact either Huw Cooke or Jamie Cameron on 0117 902 7719 and 0117 902 7712 respectively.

BERR has just published a further consultation document entitled "Dispute Resolution" secondary legislation consultation please see <http://www.berr.gov.uk/consultations/page46889.html>

## What a difference a day made, twenty four little hours...

The case of *Plewes -v- Adams Pork Produce Limited* is a salutary tale for all employers who fail to follow statutory procedures, do not have their contractual documents in order and fail to win the sympathy of the tribunal. As a consequence Mr Plewes was awarded over £36,000 by the tribunal in his claim for age discrimination.

The key facts are:

- Mr Plewes' contract of employment contained a clause which stated that the normal retirement age (NRA) was the day before the 65th birthday and he was dismissed on the grounds of retirement on that day;
- the employer did not follow the statutory dismissal procedures (SDDPs);
- Mr Plewes had made a request to work beyond his NRA but he had been refused;
- as a consequence he submitted a grievance, to which he never received a response;

- two weeks later Mr Plewes was re-engaged by his former employer through an agency at a lower wage.

As the employer had retired Mr Plewes prior to his 65th birthday (albeit only the day before) it could not rely on the default retirement exemption in regulation 30 of the Employment Equality (Age) Regulations 2006. The only defence available to the employer was to objectively justify retiring him before the NRA, which it conceded it could not do. Mr Plewes' dismissal was found to be discriminatory.

The tribunal uplifted the award by 50%, the maximum applicable, for the employer's failure to follow the SDDPs. If that was not enough Mr Plewes was awarded a further £4,000 for legal costs as the employer's defence had been "misconceived". There are an increasing number of age discrimination cases being brought and in light of this case, employers should check their contracts of employment and policy documentation to ensure that they comply strictly with the relevant regulations.

# Pension leave

For babies and adoptions due from 5 October 2008, accrual in an occupational pension scheme must continue during the first 13 weeks of additional maternity / adoption leave whether or not the leave is paid. Today accrual is only required if this leave is paid. There is no change during the second 13 weeks; pension need only accrue if there is (contractual) pay. The original law on pension and family leave was unclear; the amended law is even more so. Our interpretation of it is pragmatic.



The chief uncertainty is that, contrary to our view, the law might in fact require accrual during the second 13 weeks of additional leave when it is unpaid. But any risk here is for a limited period because, on current plans, the government will extend statutory pay to the

full 52 weeks leave by October 2010. Clearly, an employer or scheme wanting a no risk approach from this October should provide accrual during the full 52 weeks regardless of pay.

## Minimum requirements for pension accrual

Leave	DEFINED BENEFIT e.g. final salary			DEFINED CONTRIBUTION i.e. money purchase		
	Benefits	Employer conts □	Employee conts	Benefits	Employer conts	Employee conts
Ordinary maternity	Full	At work pay	Actual pay	Based on conts	At work pay	Actual pay
Wks 1-13 addit. mat.	Full	At work pay	Actual pay	Based on conts	At work pay	Actual pay
Wks 14-26 addit. mat. - paid (contract)	Full	At work pay	Actual pay	Based on conts	At work pay	Actual pay
Wks 14-26 addit. mat. - unpaid	No ★ obligation	No ★ obligation	No ★ obligation	No ★ obligation	No ★ obligation	No ★ obligation
Paternity	Full	At work pay	Actual pay	Based on conts	At work pay	Actual pay
Addit. paternity - paid ●	A new concept not yet in force. Expected by 2010					
Ordinary adoption	Full	At work pay	Actual pay	Based on conts	At work pay	Actual pay
Wks 1-13 addit. adopt.	Full	At work pay	Actual pay	Based on conts	At work pay	Actual pay
Wks 14-26 addit. adopt. - paid (contract)	Full	At work pay	Actual pay	Based on cont	At work pay	Actual pay
Wks 14-26 addit. adopt. - unpaid	No ★ obligation	No ★ obligation	No ★ obligation	No ★ obligation	No ★ obligation	No ★ obligation
Parental - paid (contract)	Based on actual pay	Actual pay	Actual pay	Based on conts	Actual pay	Actual pay
Parental - unpaid	No obligation	No obligation	No obligation	No obligation	No obligation	No obligation
Other family leave - paid (contract)	Based on actual pay	Actual pay	Actual pay	Based on conts	Actual pay	Actual pay
Other family - unpaid	No obligation	No obligation	No obligation	No obligation	No obligation	No obligation

### Notes

- Additional paternity leave will allow a father 26 weeks leave in the child's first year after his partner returns to work. There will be statutory pay. Schemes will have to provide benefits on the "at work" footing.
- Strictly speaking, in a DB scheme the legislation on family leave does not oblige the employer to pay a particular level of contributions. Rather, the obligation is to provide benefits based on a certain level of pay.
- ★ On our pragmatic view of the law.

## In the office

Congratulations to **Deborah and Sean Bulman** on the birth of their daughter.

Welcome to **David Stott** who joined the employment team from Eversheds in June.

Congratulations to **Alice Honeywill** (nee Coopman) and her husband on their marriage. We wish them all the best!

Good luck to **Huw Cooke, Jamie Cameron, Rich Stovell and Chris Seaton** on the charity bike ride in September (Bristol to Paris) to raise money for The Jessie May Trust. See Burges Salmon website for details.

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